

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2009 Session

**ROGER BROWN v. JOHN ROEBUCK & ASSOCIATES, INC., JOHN
ROEBUCK, JODY HOPKINS, JASPER JONES, AND JOHNNY
MITCHUM**

**Appeal from the Chancery Court for Perry County
No. 4486 R.E. Lee Davies, Judge**

No. M2008-02619-COA-R3-CV - Filed December 16, 2009

The high bidder at a real estate auction brought suit against the auction company, its president, and company employees alleging multiple counts. The auction company filed a third-party complaint against the sellers. The trial court granted partial summary judgment in favor of the plaintiff on his fiduciary duty claim and awarded damages and attorney fees. The plaintiff nonsuited his fiduciary duty claims against the individual defendants. The trial court entered an order stating that the judgment resolved the entire claim for breach of fiduciary duty and directing that it be entered as a final judgment under Tenn. R. Civ. P. 54.02. Because we have determined that the trial court erred in certifying the judgment as final under Tenn. R. Civ. P. 54.02, we vacate the trial court's order and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and
Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Donald N. Capparella and Amy J. Farrar, Nashville, Tennessee, and David F. Leake, Stephen C. Barton, and William H. Haltom, Jr., Memphis, Tennessee, for the appellant, John Roebuck & Associates, Inc.

Marc McNamee and Gerald Neenan, Nashville, Tennessee, and William Stuart Fleming, Columbia, Tennessee, for the appellee, Roger Brown.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

John Roebuck & Associates, Inc. (“JRA”) conducted an absolute auction on July 28, 2005, to sell parcels of the Wagner estate, a tract of land encompassing over 2,000 acres on the Tennessee River in Perry County, Tennessee. The Wagner Estate was owned by the Fred Wagner Revocable Trust and the Bonnie Wagner Revocable Trust (“Sellers”). Roger Brown was the high bidder on most of the property sold at the auction. Mr. Brown and Sellers entered into a sales contract pursuant to which Mr. Brown paid earnest money in the amount of \$312,963.90 to be held by JRA and to be “considered a part of the Buyer’s premium earned by and to be paid by Buyer to JRA.”¹ The earnest money was deposited by JRA in its escrow account. The final purchase price was contingent upon the actual surveyed acreage, which would be multiplied by the price per acre. The contract provided that the closing would take place within 30 days of the execution of the contract. On August 18, 2005, Sellers and Mr. Brown executed an addendum to the sales contract extending the closing date until January 31, 2006, and giving Mr. Brown a right of access to the property.

At the time of the auction, Mr. Brown was not aware that Sellers had previously entered into a timber deed giving John Stoltzfus the right to cut and remove timber until December 31, 2006, from certain parts of the Wagner estate, including portions of the property upon which Mr. Brown bid. The timber deed was not recorded. JRA knew about the timber deed prior to the auction but did not inform the prospective buyers. Mr. Brown learned of the existence of the timber deed sometime after the auction.

The sale never closed, and there are factual disputes concerning the reasons why the closing never occurred. JRA asserts that it had no written confirmation of the extension of the closing date, believed Mr. Brown was unable to close, and considered the earnest money earned when the sale failed to close prior to the original closing deadline. Mr. Brown asserts that the closing never occurred because the owners never produced good title. It is undisputed, however, that JRA transferred earnest money funds from its escrow account to its operating account in two transactions, one on August 31, 2005, and another on October 11, 2005.²

Mr. Brown filed this action against JRA on February 21, 2006. The original complaint includes five causes of action. The first count is for misrepresentation in a business transaction and alleges that JRA provided “false, misleading and materially incomplete information” to Mr. Brown concerning the property and that Mr. Brown reasonably relied on this information in deciding whether to bid and how much to bid on the property. Asserting that JRA’s conduct was “intentional,

¹ Other contract provisions provided for the return of the earnest money to the buyer in the event the seller could not provide good title or otherwise breached the contract. In the event of the buyer’s breach of the contract, JRA could retain the deposit to the extent of the buyer’s premium.

² On September 21, 2005, \$33,489.06 of the earnest money in the escrow account was turned over to an attorney (and later deposited into court and released to Mr. Brown) due to a recalculation of the acreage to be sold.

fraudulent, malicious and/or reckless,” the complaint seeks compensatory and punitive damages and equitable relief, including return of the earnest money. The second count is for fraud and alleges that JRA falsely advertised the property by touting the value of the timber without disclosing the timber deed and that JRA made false representations regarding material facts and failed to disclose material facts to Mr. Brown, who reasonably relied on these representations in bidding and entering into the sales contract with Sellers. For fraud, Mr. Brown seeks compensatory and punitive damages and return of the earnest money. In the third count, Mr. Brown alleges that JRA violated the Tennessee Consumer Protection Act (“TCPA”) by engaging in unfair or deceptive acts and that these acts were willful or knowing violations, thereby entitling him to treble damages; he also seeks actual damages, reasonable attorney fees and costs, and return of the earnest money.

The fourth count of the original complaint is for professional negligence. Mr. Brown asserts that JRA owed certain duties to him by virtue of its status as a licensed real estate broker and licensed auctioneer and that JRA breached these duties by “providing false, misleading and incomplete information to Plaintiff with respect to the Property; failing to provide information that it had a duty to disclose to Plaintiff . . .; and failing to retain all of Plaintiff’s earnest money deposit in Roebuck’s trust account.” Mr. Brown alleges that JRA’s breaches of its obligations were intentional, fraudulent, malicious and/or reckless, thus entitling him to punitive damages. He also seeks compensatory damages, including the return of the earnest money, and revocation of JRA’s real estate broker and auctioneer licenses. In the fifth count, Mr. Brown seeks a declaratory judgment that the real estate sales contract is not enforceable against him due to JRA’s misconduct and under the statute of frauds and that he is entitled to a refund of the earnest money.

JRA answered Mr. Brown’s complaint and asserted a counterclaim for procurement of a breach of contract. According to JRA, Mr. Brown deliberately interfered with the fiduciary relationship between JRA and Sellers, thereby causing Sellers to refuse to close the sales with Mr. Brown and other successful bidders at the auction. JRA also asserted a third-party complaint against Sellers for indemnification and reimbursement and for breach of contract.³ The parties engaged in discovery.

Mr. Brown filed an amended complaint in April 2008 in which he added as defendants John Roebuck, president of JRA, and JRA employees Jody Hopkins, Jasper Jones, and Johnny Mitchum (collectively “the individual defendants”). The amended complaint also includes several new causes of action. Count I of the amended complaint, for conversion, alleges that the defendants “appropriated funds belonging to Plaintiff for Defendants’ own use in exclusion and defiance of Plaintiff’s rights” and that this conduct was intentional, fraudulent, malicious and/or reckless. For conversion, Mr. Brown seeks damages, including payment of the converted funds and punitive damages. The next four counts restate allegations of the original complaint to apply to the individual defendants as well as to JRA: Count II of the amended complaint is for misrepresentation in a business transaction; count III is for fraud; count IV is for violations of the TCPA; and count V is

³ The third-party defendants are Fred O. Wagner, individually and as trustee of the Fred O. Wagner Revocable Trust, and Bonnie D. Wagner, individually and as trustee of the Bonnie D. Wagner Revocable Trust.

for professional negligence. Count VI of the amended complaint alleges breach of contract on the theory that JRA was a party to the sales contract between Mr. Brown and Sellers and was obligated by the contract and by statements made at the auction to hold the earnest money in escrow until the closing or until properly disbursed in compliance with the sales contract. In count VI, Mr. Brown seeks compensatory damages, including return of the earnest money, and attorney fees. Count VII reasserts the declaratory judgment cause of action against JRA.

Count VIII of the amended complaint, for breach of fiduciary duty, alleges that Jasper Jones, Johnny Mitchum, JRA, and John Roebuck “breached their fiduciary duties to Plaintiff by transferring all of Plaintiff’s earnest money deposit out of Roebuck’s escrow account without Plaintiff’s knowledge or consent, before the closing occurred, and in violation of [the sales contract]” and refusing to return the money to Mr. Brown. The complaint seeks compensatory and punitive damages. In the final count of the amended complaint, count IX, Mr. Brown asserts that he is entitled to equitable relief (an equitable lien, equitable tracing, a resulting trust, or a constructive trust) “to recover the direct or indirect products and proceeds of Plaintiff’s earnest money deposit.”

In May 2008, Mr. Brown moved for partial summary judgment against all of the defendants with respect to the actions for conversion, breach of fiduciary duty, breach of contract, and TCPA violations. The individual defendants were granted a continuance, but the court considered Mr. Brown’s motion with respect to JRA at a hearing in August 2008. In a memorandum opinion, the court ruled that summary judgment in favor of Mr. Brown was appropriate on the theory of breach of fiduciary duty. The court concluded that reasonable minds could not disagree that “[t]he unilateral decision by Roebuck & Associates to take Plaintiff’s deposit out of its escrow account and use it for its own benefit amounted to an absolute breach of its fiduciary duty.” After stating that the imposition of attorney fees was justified when a fiduciary deliberately used its position of trust for its own enrichment, the court found that an award of attorney fees was appropriate in this case. On the breach of contract claim, the court concluded that JRA was no more than a third-party beneficiary to the sales contract, and that Mr. Brown had no cause of action against JRA under the contract. As to the other two claims, for conversion and TCPA violations, the court found these counts were not appropriate for summary judgment because they involved allegations of intentional conduct and it was the province of the jury to determine whether JRA’s conduct was intentional.

In accordance with the memorandum opinion, the court entered an order on September 4, 2008, granting Mr. Brown summary judgment against JRA for breach of fiduciary duty and awarding him a judgment of \$312,963.90 for the amount of the earnest money, plus prejudgment interest. The court awarded Mr. Brown his attorney fees in the amount of \$338,000.00. The court also made the following ruling:

Plaintiff has advised the Court through his counsel that, in order to obtain a final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, Plaintiff will not seek an award of punitive damages as part of this judgment against John Roebuck & Associates, Inc. for breach of fiduciary duty. However, Plaintiff has reserved the right to seek an award of punitive damages on other causes of action

herein with respect to which punitive damages can be awarded to Plaintiff, in the event that he is successful on such cause(s) of action. Plaintiff has also voluntarily dismissed, without prejudice, pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, his cause of action herein against the individual Defendants for breach of fiduciary duty, while reserving and continuing to pursue all his other causes of action against the individual Defendants herein. Accordingly, this Judgment resolves Plaintiff's entire claim for breach of fiduciary duty. Plaintiff has been deprived of his earnest money deposit for over three years and has paid substantial fees and expenses to recover his earnest money deposit. The Court hereby makes an express direction that this Judgment be entered as a final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, there being no just reason for delay in entering a final judgment in favor of Plaintiff on this cause of action.

JRA filed a motion to alter or amend the court's September 4, 2008 order, and the court denied the motion.

After filing this appeal, JRA petitioned this court to dismiss the appeal on grounds that the trial court improperly entered a final judgment pursuant to Tenn. R. Civ. P. 54.02. This court declined to dismiss the appeal but specified that this denial was "without prejudice to the appellant raising the issue in its brief." In this appeal, JRA again asserts that the trial court wrongfully certified the grant of partial summary judgment as final under Tenn. R. Civ. P. 54.02. JRA also argues that the trial court erred in granting partial summary judgment on the fiduciary duty claim, in awarding attorney fees, and in denying JRA's motion for a continuance of the hearing on attorney fees.

ANALYSIS

We must begin with the issue of whether this matter is properly before this court for review.

Under Tenn. R. App. P. 3(a), "every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right." Except as permitted by Tenn. R. App. P. 9 or Tenn. R. Civ. P. 54.02, "if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable" Tenn. R. App. P. 3(a). The asserted basis for appellate jurisdiction in this case is the trial court's certification of the grant of partial summary judgment as final under Tenn. R. Civ. P. 54.02.

Tenn. R. Civ. P. 54.02 provides, in pertinent part, as follows:

When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court . . . may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no

just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties

Since Tenn. R. Civ. P. 54.02 is substantially identical to Fed. R. Civ. P. 54(b), federal court opinions are considered persuasive authority in construing Rule 54.02. *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990). Rule 54(b) was promulgated as a result of the liberalization of joinder rules, which necessitated “a revision of what could be considered a ‘judicial unit’ for purposes of appellate jurisdiction.” *Coal. for Equitable Minority Participation in Architectural Contracts in Tenn. (COMPACT) v. Metro. Gov’t of Nashville & Davidson County*, 786 F.2d 227, 230 (6th Cir. 1986). The Sixth Circuit has described the underlying considerations as follows: “Sound judicial administration warrants allowing appeal on some claims or parties before the entire case is finally adjudicated, but it does not warrant blurring the concept of finality as to a single claim or as to one party. Rule 54(b) therefore does not countenance piecemeal review of a claim.” *Id.* (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432 (1956)). Similarly, we have stated that “[t]he purpose of the [Rule 54.02] certification rule is to enhance judicial economy and ‘to prevent piecemeal appeals in cases which should be reviewed only as single units.’” *Cates v. White*, No. 03A01-9104CH00130, 1991 WL 168620, at *3 (Tenn. Ct. App. Sept. 4, 1991) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980)).

Courts generally apply a dual standard of review in determining the propriety of Rule 54(b) certification. *Gen. Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1027 (6th Cir. 1994). Under this dual standard, “[t]he determination that a particular order ultimately disposes of a separable claim is a question of law reviewed *de novo*, while the finding of no just reason for delay is only reviewed for an abuse of discretion.” *Id.* Although we find no Tennessee cases precisely addressing this question, we find the dual standard of review appropriate with respect to Tenn. R. Civ. P. 54.02.⁴

An order is certifiable under Rule 54.02 “‘only if it disposes of at least one claim’ or party.” *Cates*, 1991 WL 168620, at * 3 (quoting *Rudd Constr. Equip. Co., Inc. v. Home Ins. Co.*, 711 F.2d 54, 56 (6th Cir. 1983)). Mr. Brown argues that, in the present case, certification is justifiable under either prong of Rule 54.02: multiple claims or multiple parties. We disagree with this interpretation of Rule 54.02. The language and purpose of the rule lead us to conclude that the multiple party prong “applies only if the [trial court’s] judgment disposes of all of the rights or liabilities of one or more of the parties.” *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990). The trial court’s partial summary judgment order does not eliminate any of the parties in this case. All of the original parties remain with respect to other claims. Therefore, the issue under Tenn. R. Civ. P. 54.02 is whether the order disposed of one or more claims.

⁴In *Newell v. Exit/In, Inc.*, No. M2003-00434-COA-R3-CV, 2004 WL 746747, at * 1 (Tenn. Ct. App. Apr. 7, 2004), a case in which we applied an abuse of discretion standard, it appears that the appellant did not challenge the separability of the certified judgment, which resolved all issues of liability but did not address indemnity between guarantors; the appellant argued only that the trial court abused its discretion in certifying the judgment as a final order.

What constitutes a “claim” for purposes of Rule 54.02? We begin by addressing Mr. Brown’s contention that “[t]he exact definition of ‘claim’ for the purposes of Federal Rule 54(b) is ‘unsettled,’” a proposition for which he cites two cases from other circuits, *Oklahoma Turnpike Authority v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001), and *Samaad v. City of Dallas*, 940 F.2d 925, 930 (5th Cir. 1991). In *General Acquisition, Inc. v. GenCorp., Inc.*, the Sixth Circuit acknowledged the lack of any generally accepted test for determining what constitutes a claim for relief under Rule 54(b). *Gen. Acquisition*, 23 F.3d at 1028. The court noted, however, that it had considered the issue before and went on to adopt and apply the analysis previously set out in *McIntyre v. First National Bank of Cincinnati*, 585 F.2d 190, 191 (6th Cir. 1978). *Gen. Acquisition*, 23 F.3d at 1028. Furthermore, this court has relied on *General Acquisition* and *McIntyre* in deciding two cases presenting the issue of what constitutes a claim under Tenn. R. Civ. P. 54.02. *Christus Gardens, Inc. v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. M2007-01104-COA-R3-CV, 2008 WL 3833613, at *5 (Tenn. Ct. App. Aug. 15, 2008); *Tucker v. Capitol Records, Inc.*, No. M2000-01765-COA-R3-CV, 2001 WL 1013085, at *7-10 (Tenn. Ct. App. Sept. 6, 2001). Thus, we rely in part on these federal cases in interpreting Rule 54.02.

In *Tucker*, this court quoted extensively from the Sixth Circuit’s decision in *General Acquisition* and applied the “*McIntyre* test.” *Tucker*, 2001 WL 1013085, at *10. The *McIntyre* court applied the following analysis in determining that state and federal causes of action constituted a single claim: “Even though different theories of liability may have been asserted, the concept of a ‘claim’ under Rule 54(b) denotes ‘the aggregate of operative facts which give rise to a right enforceable in the courts.’” *McIntyre*, 585 F.2d at 192 (quoting *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir. 1963)). Applying this test, the *Tucker* court concluded that the plaintiffs’ claims involved a single aggregate of operative facts and therefore constituted a single claim:

The entire relationship between Tucker and Capitol involves a single aggregate of operative facts. Whether this aggregate of operative facts, when delineated by the trial court after trial on the merits, established breach of contract, termination of contract, alternative tort liability or no liability, these facts establish a single claim for the purposes of appellate jurisdiction under Tennessee Rule of Civil Procedure 54.02.

Tucker, 2001 WL 1013085, at *10.

The plaintiff in *Christus*, a legal malpractice case, asserted three theories of liability: failure to give appropriate settlement advice, failure to inquire into applicable insurance coverage, and failure to file a timely notice of appeal. *Christus*, 2008 WL 3833613, at *2. The trial court dismissed two of these claims based upon the statute of limitations and then granted a motion to certify the order of dismissal as a final order under Rule 54.02. *Id.* at *1. In reversing the trial court’s decision, this court applied the principles of *McIntyre* and *General Acquisition* and stated:

All three theories arise from an aggregate set of operative facts, namely, Baker's defense of Christus in the Cotter lawsuit. Accordingly, Christus' multiple incidents of legal malpractice are based upon a closely related series of occurrences. Thus, it was improper for the trial court to allow some of Christus' theories to be appealed, without disposing of all of them.

Id. at *5.

In the present case, all nine of the causes of action asserted by Mr. Brown arise out of the same aggregate set of operative facts: the auction of the Wagner estate and JRA's actions with respect to the earnest money. The allegations of some of the causes of action—for example, the fraud and misrepresentation counts—focus on JRA's actions prior to the auction in making representations concerning the land to be sold. The counts alleging breach of fiduciary duty and conversion focus on JRA's actions with respect to the escrowed earnest money. It could be argued that those counts pertaining to JRA's actions prior to the auction are factually distinct from those focusing on the auction itself and the earnest money deposit.⁵ We need not, however, consider that distinction because at least one of the counts remaining after the trial court's grant of partial summary judgment on the fiduciary duty count relates to the exact set of operative facts applicable to the fiduciary duty claim. Given the identity of operative facts, we must conclude that the conversion and fiduciary duty counts should be considered a single claim for purposes of Rule 54.02.⁶ Therefore, the trial court erred in separating the two counts for purposes of appeal.⁷

We reject Mr. Brown's suggestion that the availability of different types of damages for causes of action makes them separate claims under Rule 54.02. In our previous cases, we have cited the principle that “a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.” *Christus*, 2008 WL 3833613, at *5 (quoting *Gen. Acquisition*, 23 F.3d at 1028); *Tucker*, 2001 WL 1013085, at *8; *see also* 10 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 54.22[2][b][ii] (3d ed. 2009).

Moreover, even if we were to accept Mr. Brown's argument that the fiduciary duty count was a separate claim, we would find the trial court's Rule 54.02 certification improper under the second

⁵ Mr. Brown cites *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901 (Tenn. 1999), for the proposition that TCPA claims and common law claims are distinct claims. We do not consider this case pertinent here since it addresses claims for purposes of election of remedies, not in the context of Rule 54.02. *Id.* at 906.

⁶ While we need not decide whether all nine of the counts presented by Mr. Brown constitute a single claim for purposes of Rule 54.02, we note that the interlocking facts would support such a conclusion.

⁷ We recognize that some cases have discussed an alternative “recoveries” theory for determining whether there are separate claims under Rule 54.02. *See Gen. Acquisition*, 23 F.3d at 1028-29. While this theory was mentioned in *Tucker*, we do not consider the theory to have been adopted by our prior decisions since the primary discussion has been under the “aggregate of operative facts” theory from *McIntyre*. *Christus*, 2008 WL 3833613, at *5; *Tucker*, 2001 WL 1013085, at *7-10.

prong of the analysis. We conclude that the trial court erred in determining that there is no just reason for delay.

Although trial courts have considerable discretion in making the determination as to whether there is reason to delay appellate review, such a determination is subject to reversal if the court “fails to ‘weigh and examine the competing factors involved in the certificat[ion] decision.’” *Gen. Acquisition*, 23 F.3d at 1030 (quoting *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 61-62 (6th Cir. 1986)). The Sixth Circuit has set out a list of factors to be considered when making such a determination:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Id. These factors have been adopted by this court. *Newell*, 2004 WL 746747, at *2; *Cates*, 1991 WL 168620, at *3.

The only justification given by the trial court in its certification order is that “Plaintiff has been deprived of his earnest money deposit for over three years and has paid substantial fees and expenses to recover his earnest money deposit.” Other factors, however, weigh heavily against allowing a separate appeal on the fiduciary duty count. As discussed above, the fiduciary duty count is based upon the same set of facts involved in the other eight counts and, with respect to some of the remaining counts, the factual basis is identical. In its memorandum opinion, the trial court concluded that an award of attorney fees on the fiduciary duty claim was appropriate based upon the deliberateness of JRA’s use of its position to enrich itself. With respect to the conversion and TCPA counts, however, the trial court declined to award summary judgment because “it is the province of the jury to make the determination as to whether the conduct was intentional or not.” The actions involved in the fiduciary duty and conversion counts are the same, and the other counts revolve around the same set of facts. It is possible that the jury’s findings as to some of the factual issues present in the remaining claims would be inconsistent with the trial court’s grant of partial summary judgment on the fiduciary duty claim and that this court would be faced with duplicative appeals based upon the same facts. On the whole, weighing all of the factors, we believe the trial court erred in certifying the fiduciary duty count under Rule 54.02.

In light of this conclusion, the remaining issues are pretermitted.

CONCLUSION

The trial court's order certifying the judgment as final under Rule 54.02 is vacated, and the case is remanded for further proceedings. Costs of the appeal are assessed against Mr. Brown, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE